SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1645

MICHAEL F. COIRO, JR.,

Petitioner,

against

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: June 27th, 1975

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The Petitioner, Michael F. Coiro, Jr. prays that a Writ of Certiorari issue to review the judgment entered on May 29th, 1975, by the United States Court of Appeals for the Second Circuit, in the proceeding entitled In Re Michael F. Coiro, Jr., Attorney for Thomas De Simone, Docket No. 74-1039.

Opinion Below

The Court of Appeals for the Second Circuit rendered its judgment in this case without opinion. The judgment of the Court of Appeals appears in the Appendix at Page A-1.

Jurisdiction

The judgment of the Court of Appeals was entered on May 29th, 1975. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

Whether Petitioner-Attorney's conduct in the case at bar was sufficient to warrant a conviction for criminal contempt?

Statutory Provisions Involved

Title 18, United States Code, Section 401, provides that

> "A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) misbehavior of any of its officers in their official transactions;
>
> (3) disobedience or resistance to its lawful writ, process, order, rule, degree, or command."

Rule 42(b) of the Federal Rules of Criminal Procedure provides as follows:

> "(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States Attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The

> defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Rule 7 of the Individual Assignment and Calendar Rules of United States District Court for the Eastern District of New York provides:

> "Conference 'After a case has been assigned, the judge may direct the attorneys for each party to meet with him to discuss the case informally, to entertain oral motions and, to the extent possible and desirable, to discuss settlement or to set a schedule for the case, including for discovery, pre-trial and trial."

Statement of The Case

The Petitioner is an attorney who was fined in the amount of $1,000 for his failure to appear in the Federal District Court on a scheduled date for trial. In response to the charges against him, Petitioner explained that one week prior to the date in question he was ordered by a New York State Supreme Court Justice to begin another trial which made it impossible for him to appear in Federal Court. Petitioner further explained that the State Court Justice was advised of the pending Federal engagement but refused to respect that commitment and further, that Petitioner attempted to give reasonable notice to the District Court Judge of his State Court commitment.

The relevant facts are not in dispute. On May 2nd, 1974, petitioner undertook the representation of Thomas De Simone, a defendant named in Indictment, 74 CR 336, filed in the United States District Court for the Eastern District of New York on the previous day, May 1st.

The De Simone case was first tried in October of 1974. On October 3rd, 1974, a mis-trial was declared after the jurors' reported that they were unable to reach a unanimous verdict. Following dismissal of the jury, re-trial was set for November 18th, 1974. Thereafter, the case was re-scheduled to begin on November 25th, 1974. This adjournment was at the request of Government counsel.

Five days prior to the scheduled date of trial, on November 20th, 1974, petitioner contacted District Court Judge Bartels' chambers and requested an adjournment of the De Simone trial on the ground that he was unavoidably engaged in the trial of another criminal case in the New York State Supreme Court, Queens, County. This request for an adjournment was denied. The District Court, disregarding counsel's actual engagement, summoned a jury panel and stood ready to try the case. As Petitioner was actually engaged in trial, he did not appear.

Although the District Court had been informed that the State Court case would last for several weeks, the De Simone trial was re-scheduled for one week later, December 2nd, 1974. In response to notification of the December 2nd date, Petitioner submitted a sworn affidavit which recited the fact that he was still engaged in the trial of the same case in Queens County. On the basis of this affidavit the trial was again re-scheduled for January 6th, 1975, when it was ultimately tried.

On December 9th, 1974, Judge Bartels signed an order directing Petitioner to show cause why he should not be

punished for contempt of court, pursuant to Title 18, United States Code, Section 401(3) and Rule 42(b) of the Federal Rules of Criminal Procedure. The Order to Show Cause set forth the above stated facts.

On January 16th, 1975, a hearing was held on the contempt charge. At that hearing Petitioner explained his inability to begin the De Simone trial on the scheduled date of November 25th. One week earlier, on November 18th, 1974, Petitioner made an appearance in the criminal case of People of the State of New York against Joseph Zevrizzo. (A 12)[1] This was a multiple defendant case involving five defendants represented by four lawyers. Petitioner stated that he did not immediately inform Judge Bartels' of the Queens engagement because there were plea negotiations and "counsel thought that the case would ultimately be disposed of by way of a plea." (A 12) As soon as counsel realized that the case would have to be tried he informed Judge Bartels' Chambers. (A 12-13) Exercising even further caution, Petitioner asked that the State Supreme Court Justice's Law Secretary contact Judge Bartels to officially notify him of the engagement. (A 13) This effort was unsuccessful due to the intervening Thanksgiving Holidays. (A 13)[2]

Petitioner further explained that he made the State Supreme Court Justice aware of his imminent Federal engagement but nevertheless was ordered to proceed to trial (A 15, 18, 21) In Petitioner's words, "He ordered me to proceed anyway . He had the other three lawyers there." (A 21) Rejecting this excuse, the Federal District Court

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[1] The letter "A" refers to Appellant's Appendix on file in the United States Court of Appeals for the Second Circuit.

[2] This call was made after the scheduled date of November 25th but before the adjourned date of December 2, 1974.

Judge reasoned that he could protect counsel from a contempt proceeding from the State Court Judge but conversely the State Court Judge could not protect counsel from a Federal contempt proceeding. (A 23) Recognizing that counsel was on the horns of a dilemma, Judge Bartels concluded by stating "You just bet on the wrong horse." (A 23) On the basis of this conduct, Petitioner was "charged" $1000.00. (A 23)

Reasons for Granting the Writ

Petitioner respectfully calls upon this Court, in the exercise of this Court's supervisory power, to review the action taken by the District Court which was summarily ratified by the Circuit Court of Appeals. What is at stake here is not simply a $1,000 fine or even the isolated discipline of a single attorney. More importantly, this case affords the court an opportunity to set forth guidelines, heretofore uncertain, concerning priorities and obligations of attorneys to insure the prompt disposition of criminal cases. This is particularly necessary in an era where the backlog of criminal cases has become one of the most acute problems facing the administration of criminal justice.

Petitioner herein freely admitted to the District Court, as he does on this Petition, that he was impaled on the horns of a dilemma with an uncertain plan of resolution. Had there been precise and definitive guidelines specifically addressed to this situation, what happened in this case could not have occurred. Or stated differently if it had then occurred Petitioner would have no cause to complain about the action taken against him.

With reference to the particular facts of this case, Petitioner's contention is that his conduct did not rise to the

level of a criminal contempt. First, it should be noted that the District Court characterized the sanction imposed on Petitioner as something less than criminal contempt, in the nature of assessment of costs. However, the charges against Petitioner were specifically pleaded in a criminal milieu. Indeed, the prayer for relief cites specific reference to the criminal contempt provisions of Title 18, United States Code, Section 401(3) and Rule 42(b) of the Federal Rules of Criminal Procedure. The hearing on the Court's Order to Show cause discloses that an essential ingredient of the punishment was to deter others from engaging in similar conduct. The District Court stated that

> "It is my duty to set the rule straight so that others cannot follow". (A 16)

Earlier the Court had stated that

> "Now I am giving you this Order to Show Cause not because I want in any way to impose sanctions on you for my sake, but I want to protect this court.
>
> "I am representing the Court on the Court [sic] as a whole." (A 15)

Petitioner argued in the Circuit Court of Appeals, and Government counsel agreed, that for purposes of review the action taken was a criminal contempt. *Nye* v. *United States,* 313 U. S. 33 (1941); *McCrone* v. *United States,* 307 U. S. 61 (1939).

To warrant a conviction for criminal contempt it must be shown beyond a reasonable doubt that the contemnor had the intention to obstruct, disrupt or interfere with the administration of justice. In Re Williams, 509 F.2d 949 (2nd Cir., 1975); *United States* v. *Peterson,* 456 F.2nd 1135, 1140 (10th Cir., 1972). In *Sykes* v. *United States,* 444

F.2nd 928 (D.C.Cir., 1971) the Court noted that contempt is a

> ". . . *wilful* disregard or disobedience of a public authority."

The Court in *In Re Farquhar,* 492 F.2d 561 (D.C. Cir., 1973) stated that

> "Criminal contempt requires both a contemptuous act and a wrongful state of mind."

The Point urged by Petitioner in this case is that even if he was required to approach this problem in a different manner or indeed in the manner suggested by the District Court, his failure to do so does not constitute criminal contempt.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit Court of Appeals.

Respectfully submitted,

GERALD L. SHARGEL
Attorney for Petitioner
MICHAEL F. COIRO, JR.

LA ROSSA, SHARGEL & FISCHETTI
Of Counsel

June 27, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-1039

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of May one thousand nine hundred and seventy-five.

Present:

WILLIAM HUGHES MULLIGAN
WILLIAM H. TIMBERS
MURRAY I. GURFEIN
Circuit Judges,

In re MICHAEL F. COIRO, JR., *Attorney for Thomas DeSimone,*

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order imposing costs on appellant of said District Court be and it hereby is affirmed on the proceedings below.

WILLIAM HUGHES MULLIGAN
William Hughes Mulligan

WILLIAM H. TIMBERS
William H. Timbers

MURRAY I. GURFEIN
Murray I. Gurfein